87-417

No. 87-

FILED
SEP 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

GARY WILLOUGHBY,

Petitioner,

v.

CENTRAL ILLINOIS LIGHT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

September 11, 1987

CASILLAS PRESS INC. - 1717 K STREET NW WASHINGTON DC 20036 - 223-1220

QUESTIONS PRESENTED*

1. May a defendant in a state court action for retaliatory discharge remove the case to federal court whenever the defendant asserts that the claim is preempted by a collective bargaining agreement and section 301 of the Labor-Management Relations Act?

2. Does 28 U.S.C. § 1445(c), which bars removal of an action arising under state workers compensation laws, preclude removal of a claim for retaliatory discharge filed under state law which forbids discharge for pursuing rights under that state's workers compensation laws?

3. Does section 301 of the Labor-Management Relations Act preempt states from protecting employees against being discharged for seeking benefits under the state's workers compensation law, simply because the employee is a member of a union that has negotiated a grievance and arbitration procedure for resolving disputes with the employer about the collective bargaining agreement?

---

*All parties to the proceeding below are listed in the caption. In the court of appeals, this case was consolidated with *Hanneken v. Dixon Distributing Co. and Robert L. Dixon,* No. 86-1896, solely for purposes of oral argument.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT 4

A. Facts 4

B. Proceedings Below 5

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 15

TABLE OF AUTHORITIES

Cases: Page

Alexander v. Westinghouse Hittman Nuclear,
612 F. Supp. 1118 (N.D. Ill. 1985) 12

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 5, 8, 14

Avco Corp. v. Machinists,
390 U.S. 557 (1968) 10

Baldracchi v. Pratt & Whitney Aircraft Div.,
814 F.2d 102 (2d Cir. 1987), *cert. pending,* No. 87-318 ... 9, 12, 14

Carterpillar v. Williams,
107 S. Ct. 2425 (1987) 7, 9, 10, 11, 14

Gonzalez v. Prestress Engineering Corp.,
115 Ill.2d 1, 503 N.E.2d 308 (1986), *cert. denied,*
No. 86-1505 (1987) 8

Green v. Hajoca Corp.,
573 F. Supp. 1120 (E.D. Va. 1983) 12

Johnson v. Hussmann Corp.,
805 F.2d 795 (8th Cir. 1986) 12

Lingle v. Norge,
823 F.2d 1031 (7th Cir. 1987), *cert. pending,*
No. 87-259 ..... *passim*

Midgett v. Sackett-Chicago,
105 Ill.2d 143, 473 N.E.2d 1280 (1984) 6

Pan American World Airways v. Puchert,
472 U.S. 1001 (1985) 8

Roberts v. Citicorp Diners Club,
597 F. Supp. 311 (D. Md. 1984) 12

Page

Thomas v. Kroger Co.,
583 F. Supp. 1031 (S.D. W.Va. 1984) 12

Statutes and Rules:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 ..... 2, 6, 7, 10, 11

28 U.S.C. § 1441 ..... 2, 6, 7, 11

28 U.S.C. § 1445(c) ..... *passim*

28 U.S.C. § 1447(c) 13

Labor-Management Relations Act,
29 U.S.C. §§ 151 *et seq.* 13

Section 301, 29 U.S.C. § 185 ..... 3, 5, 14

Railway Labor Act,
45 U.S.C. § 151 *et seq.* 8

Ill. Rev. Stat. 1975, ch. 48, ¶ 138.4(h) 3, 5

Supreme Court Rule 17.1(a) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-

GARY WILLOUGHBY,

Petitioner,

v.

CENTRAL ILLINOIS LIGHT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Gary Willoughby petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the district court is unreported, and is set forth at pages 3a to 13a of the appendix to this petition (App. 3a to 13a). The decision of the court of appeals, affirming the district court on the basis of *Lingle v. Norge,*

823 F.2d 1031 (7th Cir. 1987) (*en banc*), was designated as not for publication and is set forth at App. 1a to 2a. The decision in *Lingle v. Norge* appears in the Appendix to the Petition for a Writ of Certiorari in *Lingle v. Norge*, No. 87-259, cited here as "L. Pet. App.", at pages 1a to 47a, copies of which have been furnished to the respondent here.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1987, and is set forth at 14a-15a. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1331 provides,

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441 provides, in pertinent part,

> (a) Except as otherwise provided by an Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States for th[at] district . . . .
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought.

28 U.S.C. § 1445(c), provides,

> A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides,

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Ill. Rev. Stat. 1975, ch. 48, ¶ 138.4(h), provides:

> It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights and remedies granted to him or her by th[e Workers Compensation] Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by this Act.
>
> It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

STATEMENT

A. Facts.

On January 17, 1984, petitioner Gary Willoughby suffered a back injury in the course of his employment in the gas construction department of respondent Central Illinois Light Company in Peoria County, Illinois. Respondent's employees, including Willoughby, are represented in collective bargaining by Local 51 of the International Brotherhood of Electrical Workers, and are covered by a collective bargaining agreement which guarantees employees the right to return to work following recuperation from an on-the-job injury. Article VIII, Section 15. This agreement also provides a grievance and arbitration procedure for the resolution of disputes about the collective bargaining agreement or about claims that an employee has been "treated unjustly." Article X, Section 3.

On January 30, 1984, petitioner filed a written claim with respondent regarding the back injury that he had suffered, thereby initiating the process of seeking benefits under the Illinois Workers Compensation Act. On several subsequent occasions, petitioner was warned that, if he pursued his claims under that Act, he would "pay the consequences." On November 12, 1984, petitioner's doctor released him to return to work, but respondent refused to reinstate him; ultimately, on December 19, 1984, respondent terminated petitioner's employment. Petitioner contends that he was not returned to work following his doctor's release, and was ultimately terminated, because respondent was following through on its threat to make him "pay the consequences" for asserting his rights under the state workers compensation statute.

B. Proceedings Below.

On December 10, 1985, petitioner filed an action in the Circuit Court of Illinois for Peoria County, alleging that respondent had violated section 26 of the Illinois Workers Compensation Act, Ill. Rev. Stat. Chapter 48, ¶ 138.4(h), by threatening him with retaliation if he pursued his rights under that Act, and then by terminating his employment when he continued to pursue his rights rather than withdraw his claim. Petitioner's complaint sought compensatory and punitive damages, and it relied solely on the Illinois law of retaliatory discharge – that is, the complaint neither mentioned the collective bargaining agreement, nor stated a claim which, in order to prevail, would have required reference to that agreement.

On January 6, 1986, respondent filed a petition for removal in the United States District Court for the Central District of Illinois, asserting that because petitioner was covered by a collective bargaining agreement, his claim under Illinois law was preempted by section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and that the district court had jurisdiction of the action under 28 U.S.C. § 1331 by virtue of respondent's preemption defense. On January 10, 1986, respondent moved to dismiss on preemption grounds.

On May 30, 1986, the district court ruled both that removal was proper and that the complaint should be dismissed. App. 13a. It acknowledged that the complaint did not, on its face, state a cause of action under federal law, App. 5a, 12a, but invoked the "artful pleading" doctrine to find that the complaint presented a question of federal law – namely, whether the state law claim was preempted by section 301. App. 5a. Under this Court's decision in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985), a

state law claim is preempted if, as a matter of federal law, it is "inextricably intertwined" with a collective bargaining agreement. App. 6a. This federal question, Judge Mihm decided, was a sufficient basis to find that petitioner's claim "arise[s] under the . . . laws . . . of the United States," within the meaning of 28 U.S.C. § 1331, and thus the case was removable under 28 U.S.C. § 1441. App. 6a-7a.

The district court then decided that petitioner's claim was preempted by section 301. It recognized that, in *Midgett v. Sackett-Chicago,* 105 Ill.2d 143, 473 N.E.2d 1280 (1984), the Illinois Supreme Court had held that the state cause of action for retaliatory discharge should be extended to employees covered by collective bargaining agreements, App. 8a, and that petitioner was not "bringing a claim for breach of the collective bargaining agreement." App. 12a. Nevertheless, the court reasoned that collective bargaining agreements establish the rights and terms of employment of union members, and "these matters do not exist separate and apart from the terms of the collective bargaining agreement." App. 11a. Moreover, if states were allowed to create a right of retaliatory discharge, employees would be tempted to bypass their grievance procedures by relying on state tort law. *Id.* Thus, it concluded, "a state created tort for retaliatory discharge is preempted under § 301." *Id.* Having decided that the state claim was preempted, the court added that 28 U.S.C. § 1445(c) did not bar its removal. App. 12a.

After the case was argued on appeal, the Seventh Circuit issued an *en banc* decision on similar issues of preemption and removal. *Lingle v. Norge,* 823 F.2d 1031 (1987). In *Lingle,* the Court first decided that 28 U.S.C. § 1445(c), which forbids removal of claims arising under the workers compensation laws, was no barrier to removal because re-

taliatory discharge is a tort and not a workers compensation claim, *id.* at 1038-1039, L. Pet. App. 13a, and in any event the meaning of the statutory term "workers compensation laws" is itself a federal question, regardless of the label attached by the state. *Id.* at 1039, L. Pet. App. 14a. Moreover, because "the determination of whether the tort of retaliatory discharge arises under federal law, and is therefore removable, is a federal question, . . . the plaintiffs' retaliatory discharge claims arise under federal law, so that § 1445(c) does not bar removal." *Id.*, L. Pet. App. 15a.

Next, the court decided that, although the complaints did not invoke a collective bargaining agreement, any claim for retaliatory discharge brought by a worker covered by a collective bargaining agreement must necessarily state a claim under the agreement's "just cause" provisions, and thus is merely an "artful" attempt to evade federal jurisdiction. *Id.* at 1040, L. Pet. App. 16a-17a. The court included a general reference to *Caterpillar v. Williams,* 107 S.Ct. 2425 (1987), in which this Court had held that 28 U.S.C. §§ 1331 and 1441 do not authorize defendants to remove to federal court employees' claims that they had been denied employment in contravention of a contract that was separate from the collective bargaining agreement. Despite the Seventh Circuit's passing references to *Caterpillar,* 823 F.2d at 1037 and n. 7, 1040 n. 11, 1044, L. Pet. App. 10a, 11a n.7, 17a n.11, 24a, it made no effort to explain why, although a contract claim by workers covered by a collective bargaining agreement is not removable, a tort claim brought by such workers is removable.

Finally, the court of appeals decided that retaliatory discharge claims are, in fact, preempted by section 301 because they are inextricably intertwined with collectively-bargained just cause provisions. It recognized that the Il-

linois Supreme Court had both formulated a cause of action which does not depend on an interpretation of the collective bargaining agreement, and held that such claims are not preempted, *Gonzalez v. Prestress Engineering Corp.*, 115 Ill.2d 1, 503 N.E.2d 308 (1986). Nevertheless, the Court asserted, a just cause provision necessarily extends at least as far as the retaliatory discharge cause of action. 823 F.2d. 1044, L. Pet. App. 24a-25a. Thus, in defining the state claim and deciding whether its elements were satisfied, the courts are necessarily making determinations that could be made under the collective bargaining agreement, and federal labor policy requires those determinations to be made by arbitrators rather than courts. 823 F.2d at 1046, L. Pet. App. 28a-29a.

Judge Ripple, in a dissent joined by Judge Cudahy, did not address the jurisdictional issues, but proceeded straight to the preemption issue. He focused on *Allis-Chalmers,* in which this Court decided that the state claims there were preempted, but also cautioned that preemption would not apply to "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." 823 F.2d at 1052, L. Pet. App. 41a, *quoting* 471 U.S. at 212. Moreover, he pointed out that this Court had previously dismissed, for want of a substantial federal question, an appeal from a decision by the Hawaii Supreme Court that the Railway Labor Act did not preempt that state's retaliatory discharge cause of action. 823 F.2d at ____ n.5, L. Pet. App. 46a n.5, *citing Pan American World Airways v. Puchert,* 472 U.S. 1001 (1985). Because retaliatory discharge claims neither depend on rights established by the contract, nor require reference to the contract, there is no basis for holding them to be preempted. 823 F.2d at 1055, L. Pet. App. 43a.

Immediately following the decision in *Lingle,* the court

of appeals affirmed the district court's decision in this case on the basis of *Lingle,* and designated the opinion as not for publication. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

Like *Lingle v. Norge,* pending on a petition for a writ of certiorari, No. 87-259, and *Pratt & Whitney v. Baldracchi,* pending here as No. 87-318, this case presents the question whether state retaliatory discharge claims are preempted, insofar as unionized employees are concerned, by section 301 of the LMRA. Like *Baldracchi*, but unlike *Lingle*, where the basis for removal was diversity of citizenship, this case also presents questions of the propriety of removing this case to federal court solely on the basis that respondent's preemption defense makes the case one that arises under federal law, and whether removal of this claim, which is based on a state's worker's compensation laws, is forbidden by 28 U.S.C. § 1445(c).

1. Although the court below cited this Court's decision in *Caterpillar v. Williams,* 107 S.Ct. 2425 (1987), which had been decided only two weeks before the *en banc* decision in *Lingle* was issued, it disregarded the plainly contrary holding of *Caterpillar,* and made no attempt to explain why the preemption defense is sufficient to confer jurisdiction in this case, despite the fact that it was insufficient to do so in *Caterpillar.* This failure to follow the teaching of *Caterpillar* is the first basis for granting review.

In *Caterpillar,* several employees brought an action in state court, alleging that the company had breached a promise that had been made to them, before they worked in the bargaining unit represented by their union. The promise was alleged to have been made completely separate

from any collective bargaining agreement, and involved a commitment that if the facility at which they worked were ever closed, the company would provide other employment opportunities for them. After the employees were transferred into the bargaining unit, the company closed their plant and denied them other employment, and the employees sued in state court. The company removed to federal court on the theory that, when the employees entered the bargaining unit, any promises to them had been merged into the collective bargaining agreement, and that because the employees' only viable claim was under that agreement, the claims arose under federal law and were thus within the original jurisdiction of the federal courts under 28 U.S.C. § 1331.

This Court disagreed, concluding that a federal preemption defense does not convert a claim under state law into one arising under federal law. It was true, the Court noted, that the plaintiffs might have chosen to assert rights under the collective bargaining agrement, but they had chosen to rely solely on rights found in a different contract. Not all contracts are merged into a collective bargaining agreement, and "a plaintiff is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied on is not a collective bargaining agreement." *Id.* at 2430-2431 (emphasis added).

This Court acknowledged its prior holdings that, because section 301 so completely preempts state laws which purport to govern the interpretation or application of a collective bargaining agreement, an employee who seeks to assert rights under a collective bargaining agreement is actually relying on federal law, even if he claims that he is relying on state law. *Id.* at 2430, *citing Avco Corp. v.*

Machinists, 390 U.S. 557 (1968). But where the employee seeks to rely on a separate source of rights, the "complete preemption" doctrine does not apply. *Id.* at 2432. Even if the employer wishes to argue that the creation or assertion of the independent rights was somehow barred by federal labor law, that defense must be raised in state court: "The 'artful pleading' doctrine cannot be invoked in such circumstances." *Id.*

The Seventh Circuit's jurisdictional determination in this case is directly contrary to *Caterpillar.* As in *Caterpillar,* petitioner here worked in a union shop but chose not to assert rights under his collective bargaining agreement, relying instead solely on his rights under Illinois tort law. Although respondent argues here, as did the employer in *Caterpillar,* that it acted for reasons expressly authorized by the collective bargaining agreement, or that the collective agreement precludes resort to a judicial forum, that is not a basis for removal. That defense must be litigated in state court, even if federal law were ultimately held to supersede state law or state court procedures. Because, under *Caterpillar,* an employer cannot remove a case based on state law contract rights to federal court, but must litigate its preemption defense in the state court, *a fortiori* a case based on state tort rights cannot be removed by virtue of the assertion of a preemption defense. In neither situation does the existence of a preemption defense convert a state cause of action based on a source other than a collective bargaining agreement into a "claim arising under the . . . laws . . . of the United States" within 28 U.S.C. § 1331, which is therefore removable under 28 U.S.C. § 1441.

Although the Seventh Circuit took note of the decision in *Caterpillar,* it completely failed to take this Court's

reasoning into account. Accordingly, the Court may wish to summarily reverse with instructions to the courts below to remand the case to the Illinois courts.

2. Petitioner does not contend that the second question presented – the effect of the anti-removal provision of 28 U.S.C. § 1445(c) – is independently worthy of review by this Court. However, if the Court decides to give plenary consideration to the preemption/removal question, it should consider the effect of section 1445(c) on removal of petitioner's retaliatory discharge claim, both in the interest of completeness, and because section 1445(c) provides an alternative basis for denying federal jurisdiction in this case.

Under section 1445(c), actions "arising under the workmen's compensation laws" of a state may not be removed to federal court even if they are otherwise properly removable. Every court outside the Seventh Circuit which has addressed the issue has held that claims for retaliatory discharge for having exercised rights under a state's workers compensation statute are nonremovable under 28 U.S.C. § 1445(c). *Roberts v. Citicorp Diners Club,* 597 F. Supp. 311, 314-315 (D.Md. 1984); *Thomas v. Kroger Co.,* 583 F.Supp. 1031, 1036-1037 (S.D. W.Va. 1984); *Green v. Hajoca Corp.,* 573 F.Supp. 1120 (E.D. Va. 1983). *Accord, Alexander v. Westinghouse Hittman Nuclear,* 612 F.Supp. 1118 (N.D. Ill. 1985). *Cf. Baldracchi v. Pratt & Whitney Aircraft Div.,* 814 F.2d 102, 107 (2d Cir. 1987), *cert. pending*, No. 87-318 (suggesting that section 1445(c) extends to protect state retaliatory discharge claims against preemption). *But cf. Johnson v. Hussmann Corp.,* 805 F.2d 795 (8th Cir. 1986) (upholding removal of workers compensation retaliatory discharge claim, without discussing section 1445(c)). Although most of these decisions were made in the district courts, they are the practical equivalent of

court of appeals decisions for the purpose of Supreme Court Rule 17.1(a), because decisions to remand to the state courts are not appealable. 28 U.S.C. § 1447(c).

The court below held that retaliatory discharge claims are removable, both because in Illinois the claim is based on tort, rather than the workers compensation statute itself, and because, in any event, that state claim is preempted by federal labor law and so cannot be considered to have arisen under state workers compensation law. Neither reason is persuasive. First, section 1445(c) does not simply bar removal of claims arising under state workers compensation *statutes*, but under all "workmen's compensation laws," which obviously extends to the state common law. Particularly because Illinois has recognized the retaliatory discharge cause of action in order to further implement the objectives of its workers compensation laws, the Congressional objective of preventing employers from invoking federal jurisdiction to frustrate the enforcement of workers compensation laws requires that employees be permitted to choose a state forum for the litigation of these kinds of retaliatory discharge claims without fear or removal.

Nor does the availability of a federal preemption defense override the Congressional determination that an employee may choose where to litigate all elements and defenses to claims arising under a state's workers compensation laws. Barring removal would not frustrate the federal policy favoring arbitration, as the court below feared, 823 F.2d at 1039, L. Pet. App. 14a, because removal has no effect on the policy favoring arbitration; it only changes the court in which the federal policy is initially applied, subject to eventual review in this Court. The state and federal courts are equally able to decide whether a claim under the workers compensation laws has been superseded by sec-

tion 301 in conjunction with a collective bargaining agreement or by that agreement's arbitration provisions. Congress decided in enacting section 1445(c) that the state courts are the primary adjudicators of claims and defenses under state workers compensation laws, and the fact that it may ultimately be determined that the state law claim is preempted by federal law is no basis for disregarding Congress' will in section 1445(c).

3. The third question presented — whether state retaliatory discharge claims are preempted by section 301 — seeks review of a decision that is contrary to the holdings of several other circuits as well as to this Court's decisions in *Allis-Chalmers Corp. v. Lueck, supra,* and numerous other cases discussed in the certiorari petition in *Lingle v. Norge,* No. 87-259, at 8-13. *See also Caterpillar v. Williams,* 107 S.Ct. 2425, 2431-2432 and n.10 (1987) (reaffirming limiting language of *Allis-Chalmers*). Because the *Lingle* petition states all of the arguments that petitioner would present here, we do not repeat those arguments now. *See also Pratt & Whitney v. Baldracchi,* No. 87-318.

Despite the importance of this question, petitioner does not ask the Court to set it down for plenary argument in this Court *if* the Court grants review in *Lingle,* where it is the only question presented. In that regard, the undersigned counsel also represent the petitioner in *Lingle,* and hence no purpose would be served by briefing the identical issue twice. If review is not granted in *Lingle,* however, the Court should grant review in this case on the preemption issue along with the two jurisdictional and removal issues presented.

CONCLUSION

The petition for a writ of certiorari should be granted, or the petition should be granted and the decision below summarily reversed for lack of subject matter jurisdiction, and remanded with instructions to remand to the state court.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

September 11, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
ARGUED DECEMBER 12, 1986

June 29, 1987 UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

PATRICK HANNEKEN, Plaintiff-Appellant, No. 86-1896 v. DIXON DISTRIBUTING COMPANY, an Illinois Corporation and ROBERT L. DIXON, Defendant-Appellees.	Appeal from the United States District Court for the Southern District of Illinois. No. 86 C 5006 William Beatty, Judge.
and	
GARY WILLOUGHBY, Plaintiff-Appellant No. 86-1973 v. CENTRAL ILLINOIS LIGHT COMPANY, Defendant-Appellee.	Appeal from the United States District Court for the Central District of Illinois. No. 86 C 1002 Michael M. Mihm, Judge.

ORDER

These two cases were consolidated for appeal. Both cases present the narrow issue of whether § 301 of the

*The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

Labor Management Relations Act, 29 U.S.C. § 185(a) (1978), preempts the Illinois tort of retaliatory discharge. In *Lingle v. Norge Division of Magic Chef, Inc.*, No. 85-2971 (7th Cir. June 23, 1987) (en banc), this court concluded that § 301 preempted the tort of retaliatory discharge.

In both *Hanneken* and *Dixon Distributing,* the district court found that the plaintiff's claim of retaliatory discharge was preempted. In light of *Lingle,* we affirm the judgments of the district courts.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

GARY WILLOUGHBY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 86-1002
	)	
CENTRAL ILLINOIS LIGHT COMPANY,	)	
	)	
	)	
Defendant.	)	

ORDER

The Plaintiff, Gary Willoughby, brought suit in this case, alleging that the Defendant had threatened to discharge him and did in fact discharge him for electing to exercise his rights under the Workers' Compensation Act of Illinois. The Plaintiff filed his claim in the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County, in December, 1985, and alleged that the Defendant's acts violated the provisions of the Illinois Workers' Compensation Act, Ill.Rev.Stat., Ch. 48, ¶ 138.4(h) (1983).

In response to the complaint, the Defendant filed in this Court a petition for removal of the case to federal court and a motion to dismiss for failure to state a claim for which relief can be granted. The Court will address both the petition for removal and the motion to dismiss in this opinion.

PETITION FOR REMOVAL

The Defendant argued that the petition for removal in this case is proper under 28 U.S.C. § 1441(b) because the complaint states a "claim or right arising under the Constitution, treaties or laws of the United States." The Defendant argued that the "artful pleading" doctrine has application to the facts of this case, and that the Court has a duty to look beyond the language chosen by the Plaintiff in his pleading in order to focus on the substantive allegations of the complaint. According to the Defendant, this inquiry would lead the Court to conclude that the Plaintiff is seeking redress for a right which necessarily derives from the collective bargining agreement that exists between the parties. Collective bargaining agreements and their interpretation are governed by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Therefore, the Plaintiff's cause of action is subject to removal and the fact that the Plaintiff did not characterize his complaint as a federal claim is not determinative of this issue.

The plaintiff responded by stating that his complaint does not assert a federal cause of action which can be removed to federal court. Rather, the complaint pleads a state cause of action which is separate and independent from any federal action. The additional facts which the Defendant requested that the Court look to in determining the issue of removal are not necessary to the Plaintiff's cause of action. Therefore, the Court should limit its inquiry regarding the petition for removal to the face of the complaint under what is known as the "well-pleaded complaint" doctrine. The face of the complaint states a cause of action for a tort arising under state law. Because there is no diversity of citizenship, it would be improper for the Court to remove this action from state to federal court.

Moreover, the Plaintiff argued that removal is expressly barred by 28 U.S.C. § 1445(c), which states:

> "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

The Plaintiff takes the position that his claim is a tort claim arising under ¶ 138.4(h) of the Illinois Workers' Compensation Act and cannot be removed under the terms of § 1445(c).

The Court finds that this case does present a situation in which the Court must rely on the "artful pleading" doctrine to decide the nature of the case before it. The purpose of this doctrine, as explained by the Seventh Circuit in the case of *Oglesby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985), is to prevent a plaintiff from defeating a defendant's right of removal by omitting from his complaint direct references to essential elements of his claim which would identify it as a claim grounded in federal law. The general rule is that in order for a case to be removable, the federal claim must appear on the face of the complaint, unaided by any other pleadings, including the defendant's answer or removal petition. Nonetheless, the Seventh Circuit does recognize that a plaintiff must not be allowed to deny a defendant his right to a federal forum by artfully disguising an essentially federal law claim in terms of state law.

In the present case, the Plaintiff asserts that he is stating a cause of action sounding in tort for violation of ¶ 138.4(h) of the Illinois Workers' Compensation Act, because the Defendant threatened to fire and did fire him in retaliation for his filing a claim under the Illinois Workers' Compensation Act. The Court does not find this

argument persuasive, in light of the United States Supreme Court's recent decision in *Allis Chalmers Corp. v. Lueck,* 105 S.Ct. 1904 (1985)

In *Lueck*, the Supreme Court reversed a decision of the Wisconsin Supreme Court which had held that the plaintiff's suit for the tort of bad faith in making disability payments did not arise under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). The Supreme Court held that the tort action created by Wisconsin law for bad faith delay in making disability benefit payments due under a collective bargaining agreement was preempted by § 301 of the Labor Management Relations Act because the tort cause of action was "inextricably intertwined" with the terms of the labor contract, a matter governed by federal law. In arriving at that decision, the Court stated, "While the nature of the state tort is a matter of state law, the question whether the Wisconsin tort is sufficiently independent of federal contract interpretation to avoid preemption is, of course, a question of federal law." *Id.* at 1912-13.

On the facts of the present case, the Court concludes that it is a question of federal law whether the tort alleged in the complaint is independent of the rights established by the collective bargaining agreement and governed by federal law under the Labor Management Relations Act. Although the claim is stated in terms of a tort arising under state law, the Defendant's actions which the Plaintiff is challenging are governed by the terms of the collective bargaining agreement between the Defendant and Local Union 51 of the International Brotherhood of Electrical Workers. Because the Court must determine as a matter of federal law whether the claim stated by the Plaintiff arises under state tort law or should be governed by federal law,

this lawsuit presents a claim or right arising under the laws of the United States. The Court orders that the Defendant's petition for removal is GRANTED.

MOTION TO DISMISS

Because the Court has determined that removal of this case to federal court is proper, the Court will now address the matter of the Defendant's motion to dismiss. The Defendant argued that the Court should dismiss the Plaintiff's claim because the state tort alleged is preempted by federal labor law as set forth in § 301 of the Labor Management Relations Act. The Defendant characterized the Plaintiff's complaint as a claim for wrongful discharge. According to the Defendant, this is a matter of contract interpretation governed by federal labor law because the collective bargaining agreement in force between the Plaintiff's Union and the Defendant defines the terms of Plaintiff's employment.

The Plaintiff responded by saying that the claim he is asserting is a separate and independent state claim, based on state tort law and arising under the Illinois Workers' Compensation Act. The Plaintiff pointed to language in the United States Supreme Court case *Allis Chalmers Corp. v. Lueck,* 105 S.Ct. 1904 (1985), which emphasizes the narrowness of the Court's holding in that case. The Court said: "Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is preempted by § 301." *Id.* at 1916. The Plaintiff emphasized the Court's statement that "it would be inconsistent with congressional intent under [§ 301] to preempt state rules that prescribe conduct, or establish rights and obligations, in-

dependent of a labor contract" and argued that the particular tort claim before the Court is of such an independent nature. *Id.* at 1912

The Court begins its analysis with a look at the recent developments in the law in this area. In *Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 473 N.E.2d 1280 (1984), the Illinois Supreme Court held that a cause of action in tort exists under Illinois state law for discharge of union members covered by collective bargaining agreements in retaliation for filing workers' compensation claims. The Supreme Court recognized this tort of retaliatory discharge for union employees as a means of promoting a strong public policy of insuring that workers covered by the Workers' Compensation Act are protected. The Court added, in the face of a dissent joined in by three justices, that the recognition of this tort remedy would not have any perceptible effect on the use of arbitration in labor disputes.

This Court gives great deference to the Illinois Supreme Court's interpretation of state law and has carefully considered the Court's reasoning in arriving at its decision that a separate tort action exists for a retaliatory discharge action brought under the Illinois Workers' Compensation Act by union members covered under collective bargaining agreements. Nevertheless, the United States Supreme Court in *Allis Chalmers v. Lueck,* 105 S.Ct. 1904 (1985), established that federal courts have a duty to inquire into whether a state tort is sufficiently independent of federal contract interpretation to avoid preemption under § 301 of the Labor Management Relations Act. In the *Lueck* case, the Court noted that the Wisconsin Supreme Court had held that the tort claim involved in that case was independent of any contract claim arising under the collective bargaining agreement. Nonetheless, the Court found

that the duty involved in the state tort depended upon the terms of the collective bargaining agreement and that such questions of contract interpretation were governed by federal law. The Court concluded that the complaint should be treated as a § 301 claim or dismissed as preempted by federal labor-contract law because the resolution of the state-law claim was "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Id.* at 1916.

Subsequent to *Lueck*, the Seventh Circuit decided the case of *Vantine v. Elkhart Brass Manufacturing Company, Inc.*, 762 F.2d 511 (7th Cir. 1985). In *Vantine*, the plaintiff brought a tort action in state court for retaliatory discharge for filing a workmen's compensation claim under the Indiana Workmen's Compensation Act. The defendant moved to have the case removed to federal court, on the grounds that the plaintiff's complaint was based upon a theory of liability under § 301 of the Labor Management Relations Act because the basis of the lawsuit was a collective bargaining agreement in effect between the defendant and the plaintiff's union. The Seventh Circuit noted that the Supreme Court of Indiana had created a tort remedy for at will employees who have been discharged in retaliation for filing claims pursuant to the Indiana Workmen's Compensation Act. The Indiana Supreme Court had not previously considered the issue of whether such a state remedy existed for discharged union employees. The Seventh Circuit found that under Indiana law the employee's right not to be discharged for filing a workmen's compensation claim is adequately protected by the collective bargaining agreement. The court concluded that the employee's cause of action arose under § 301 of the Labor Management Relations Act rather than the Indiana Work-

men's Compensation Act and was properly removed by the defendant to federal district court. *Id.* at 517.

In one sense, the *Vantine* case is distinguishable from the instant case because the Illinois Supreme Court has expressly recognized a cause of action for union employees for discharge in retaliation for filing a workers' compensation claim. As the Seventh Circuit pointed out, "Central to the plaintiffs' arguments that their complaint alleges only a state cause of action and that the district court's jurisdiction is barred under 28 U.S.C. § 1445(c) is the assumption that Indiana would recognize a cause of action in tort for the retaliatory discharge of an employee covered by a collective bargaining agreement." *Id.* at 516-17. Such a statement by the Seventh Circuit suggests that the court might have ruled in favor of the plaintiffs had Indiana law expressly recognized a cause of action for retaliatory discharge for employees covered by a collective bargaining agreement.

The Seventh Circuit went on to state, however, "[B]ecause an allegation of discharge and retaliation for filing a workmen's compensation claim is an allegation of a breach of the collective bargaining agreement, it arises under section 301 of the Labor Management Relations Act rather than the Indiana Workmen's Compensation Act, *Cf., Allis Chalmers Corp. v. Lueck,* ____ U.S. ____, 105 S.Ct. 1904, 85 L.Ed 2d 206 (1985)." *Id.* at 517. This conclusion shifts the focus of the court's analysis from the policies of the state Workmen's Compensation Act to the interpretation and application of the collective bargaining agreement. Although this makes the reasoning of the *Vantine* court somewhat confusing, this holding by the Seventh Circuit suggests that there is a strong federal policy in favor of looking to the terms of a collective bargaining

agreement in order to protect an employee's rights, whether or not a state has sought to protect such an employee under its own tort laws.

Under this analysis, the Court holds that a tort action, brought by a plaintiff covered under a collective bargaining agreement, for discharge in retaliation for filing a Workmen's Compensation claim is inextricably intertwined with the rights and obligations created under the collective bargaining contract. The collective bargaining agreement establishes the rights of union members and the terms of their employment, and these matters do not exist separate and apart from the terms of the collective bargaining agreement. Furthermore, as the Supreme Court explained in *Lueck*, if the Court were to hold that the state tort was independent and separate, an employee could easily bypass the grievance procedure established in a collective bargaining agreement by artfully wording his grievance to state a cause of action sounding in tort.

Because federal law governs matters of interpretation of labor contracts, the Court holds that a state created tort for retaliatory discharge is preempted under § 301 of the Labor Management Relations Act. *See, Lingle v. Norge Division of Magic Chef, Inc.,* 618 F.Supp. (C.D. Ill. 1985). The Court does not believe that there is a significant difference between the tort claimed by the Plaintiff in this case and the tort of retaliatory discharge of a union employee recognized by the Illinois Supreme Court in *Midgett v. Sackett-Chicago, Inc.,* 105 Ill.2d 143, 473 N.E.2d 1280 (1984). Consequently, the Court respectfully disagrees with the decision of the Illinois Supreme Court to the extent it impacts upon the situation presently before the Court, pointing out that the Illinois Supreme Court did not have the benefit of the Supreme Court decision in

Lueck or the Seventh Circuit decision in *Vantine* when it made its decision in *Midgett*.

It is unfortunate that the *Lueck* Court did not give examples of the types of state-law suits which would relate to a collective bargaining agreement and not be preempted by § 301, as discussed in the last paragraph of *Lueck*. Nevertheless, the Court concludes that the *Lueck* decision is applicable to the facts before the Court and holds that federal labor law under § 301 does preempt a state law claim sounding in retaliatory discharge of a union employee.

The Plaintiff's final argument that the Court should not dismiss the complaint as preempted by federal labor law is that the Plaintiff has alleged that he is entitled to relief, not only on the basis of his wrongful discharge, but also because his employer threatened to discharge him if he filed a Worker's Compensation claim. The Court does not find this effort to distinguish the previously discussed cases persuasive. In particular, the Court points out that Article X of the collective bargaining agreement establishes a grievance and arbitration procedure that an employee must use when differences arise between the employer and the employee or when the employee believes he has been treated unjustly. This contract language is broad enough to encompass the Plaintiff's allegation that the Defendant threatened to discharge him if he filed a Workmen's Compensation Act claim. Furthermore, not only do these actions come within the terms of the collective bargaining agreement, but there is no allegation that the Plaintiff has used the grievance procedure or that he is bringing a claim for breach of the collective bargaining agreement.

In conclusion, the Plaintiff's claim, which he vigorously asserts states a cause of action under state law alone, is preempted by federal labor law, which makes 28 U.S.C. § 1445(c) inapplicable. The Plaintiff's complaint does not allege a breach of the collective bargaining agreement and, therefore, the complaint does not state a cause of action for which relief can be granted. The Court orders that the Defendant's Motion for Removal is GRANTED and the Defendant's Motion to Dismiss is GRANTED on the basis of federal preemption.

It is so ordered this 30th day of May, 1986.

/s/

Michael M. Mihm
United States District Judge

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 29, 1987

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

No. 86-1896
PATRICK HANNEKEN,
Plaintiff-Appellant,
vs.
DIXON DISTRIBUTING COMPANY, an Corporation, and ROBERT L. DIXON,
Defendant-Appellees.

Appeal from the United States District Court for the Sourthern District of Illinois.
No. 86 C 5006
Judge William Beatty.

No. 86-1973
GARY WILLOUGHBY,
Plaintiff-Appellant
vs.
CENTRAL ILLINOIS LIGHT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Central District of Illinois.
Peoria Division
No. 86 C 1002
Judge Michael M. Mihm.

The cases were heard on the records from the United States District Courts for the Southern District of Illinois, Alton Division, and Central District of Illinois, Peoria Division, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgments of the said

*Hon. Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

District Courts in these cases appealed from be, and the same are hereby AFFIRMED, with costs, in accordance with the order of this Court entered this date.